



## INTERIOR BOARD OF INDIAN APPEALS

Louise Scott, et al. v. Acting Albuquerque Area Director, Bureau of Indian Affairs

29 IBIA 61 (02/07/1996)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
4015 WILSON BOULEVARD  
ARLINGTON, VA 22203

LOUISE SCOTT ET AL.

v.

ACTING ALBUQUERQUE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 95-78-A

Decided February 7, 1996

Appeal from a decision finding a lease of tribal land void ab initio.

Affirmed.

1. Contracts: Formation and Validity: Generally--Indians: Leases and Permits: Generally

The doctrine of severability, under which an invalid provision may be severed from a contract, cannot be applied to give effect to part of an invalid Indian lease.

2. Indians: Leases and Permits: Amendments

The Department of the Interior lacks authority to modify a lease of tribal trust land over the objections of the tribe.

3. Indians: Leases and Permits: Generally--Indians: Leases and Permits: Secretarial Approval

A lease of Indian trust land, although purportedly approved by a Bureau of Indian Affairs Superintendent, is not valid if, at the time of the purported approval, the Superintendent was not authorized to approve it.

4. Indians: Leases and Permits: Generally--National Environmental Policy Act of 1969: Generally

A lease of Indian land approved in violation of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370d (1994), is invalid.

APPEARANCES: William S. Eames, Esq., and Craig S. Barnes, Esq., Santa Fe, New Mexico, for appellants; Robert C. Eaton, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Area Director; C. Bryant Rogers, Esq., Santa Fe, New Mexico, for the Pueblo of Nambe.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellants Louise Scott, Angel Fiorito, Laura Farris, Denise Diener, and David Scott seek review of a January 6, 1995, decision of the Acting Albuquerque Area Director, Bureau of Indian Affairs (Area Director; BIA), which (1) found that a lease of Pueblo of Nambe (Pueblo) tribal land was void ab initio and (2) cancelled the lease to the extent it might be deemed valid. For the reasons discussed below, the Board affirms the Area Director's decision.

Background

On July 13, 1988, the Pueblo and appellants entered into Lease No. NPA 88-NA-30, covering a tract of approximately 12.69 acres of tribal land. The lease was approved on the same day by the Acting Superintendent, Northern Pueblos Agency (Superintendent; NPA), BIA.

The lease provided in part:

3. TERM

The term of this lease shall be twenty-five (25) years beginning on the date this lease is approved by the "Secretary." Lessees, or any of them, have the option to renew this lease on the same terms and conditions for an additional twenty-five (25) years except rental adjustments may be adjusted as set forth hereinafter in Article 6. [sic, should be Article 5] Rental Adjustment.

4. PURPOSE OF LEASE

Lessees shall use the leased premises for the construction of a home for full-time residential use by Lessees, erosion control, clear land, plant trees, fruits, raise livestock and construct and maintain a water system for Lessees use. Lessees shall have the right, if suitable, to use "mesas" on the North boundary of property for the construction of water well facilities and/or other residential buildings.

5. RENTALS AND RENTAL ADJUSTMENTS

The Lessees, in consideration of the foregoing, agree to pay in the following manner:

a. The Lessor waives rental fee for the first five years; Lessees within this time period will accomplish the items specified in Article 4. Purpose of the Lease.

b. Second five (5) years @ \$800.00/year.  
Third five (5) years @ \$1200.00/year.

Fourth five (5) years @ \$1500.00/year.

Fifth five (5) years @ \$2000/year.

c. At no time during the lease or lease options shall the rental rate exceed \$2000.00/year.

\* \* \* \* \*

## 15. FIRE AND DAMAGE INSURANCE

Lessees agree to insure all buildings and permanent improvements on premises against loss or damage by fire and the hazards usually included an extended coverage with insurance companies acceptable to the Lessor and the Superintendent, and in amounts acceptable to the Lessor and the Superintendent. Said policy shall show Lessor as one of the insured therein \* \* \*. \* \* \* Said insurance policy shall be filed with the superintendent of Northern Pueblos Agency when the dwelling and improvements are completed.

\* \* \* \* \*

## 19. COMPLETION OF IMPROVEMENTS

As a material part of the consideration for this lease, the Lessees covenant and agree to have complete, or have caused to be completed barring acts of God, strikes, labor or material shortages, within five (5) years after the effective date of this lease construction of a cabin or other residential buildings on the leased premises, conduct erosion control measures on said property. In the event the Lessees shall not have completed said construction then this lease may be terminated at the option of the Lessor. \* \* \* All improvements placed on the lease premises shall be constructed in a good and workmanlike manner and in compliance with applicable laws and building codes.

By 1991, the Pueblo had become concerned about the lessees' performance under the lease. In early 1992, evidently at the Pueblo's request, BIA began to review the lease file. On March 19, 1992, the Superintendent 1/ wrote to appellant Louise Scott, informing her that she was required to obtain an archeological survey prior to further construction. 2/ In the same

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1/ During the course of events relevant to this appeal, a number of different individuals served as Superintendent or Acting Superintendent. This decision does not distinguish between them.

2/ This survey was evidently to be done for purposes of compliance with the National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470-470x-6 (1994) and/or the Archeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa-470m (1994).

All further references to the United States Code are to the 1994 edition.

letter, he requested information about existing and planned improvements on the lease and requested a copy of the insurance policy on the existing improvements. Scott's response indicated, inter alia, that she planned to convert an existing building into a commercial kitchen and intended to purchase insurance upon completion of the kitchen. Following a BIA inspection of the premises, the Superintendent again requested Scott to obtain insurance on the existing structures.

An archeological survey was initiated in 1992 and approved by the Area Office on April 19, 1993. By that time, however, BIA had determined that there were questions concerning whether, prior to approval of the lease, the steps necessary for compliance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4370d, had been taken. In light of those questions, the Superintendent advised Scott not to proceed with further construction.

On September 11, 1992, the Pueblo advised BIA and appellants of its intent to seek cancellation of the lease. The Pueblo then hired an appraiser to appraise the leased premises. The appraiser concluded that the 1993 rental value of the tract was \$17,100 per year (Apr. 21, 1993, Appraisal Report at 5). With respect to the structures added by appellants, the appraiser stated: "It is the opinion of the appraiser that the workmanship, quality and utility of the improvements are not typical of the neighborhood or community standards. They do not appear to meet state and local building standards and codes." Id. at 9.

On May 18, 1993, the Pueblo, through its attorney, formally requested BIA to cancel the lease or declare it void ab initio. The Pueblo's letter included several reasons why it believed the lease was void or subject to cancellation.

On July 19, 1993, the Superintendent notified appellants of his intent to cancel the lease under 25 CFR 162.14. After describing the events summarized above, the Superintendent stated his preliminary conclusions:

A. Ms. Scott's proposed use of the premises for a "commercial kitchen . . . for processing organic produce and cheese" is not included in the purposes or uses of the premises allowed by the lease.

B. The rent that the lessees will pay beginning on July 13, 1993--\$800 per year--is below fair market value rent for the unimproved land.

C. The term of the lease exceeds that allowed by 25 C.F.R. subsec. 162.8(c), at least for that portion of the leased land used for farming purposes.

D. The lessees have violated art. 19 of the lease in that they have not completed or caused to be completed the construction

of a cabin or other residential buildings on the leased premises within five years after the effective date of the lease, i.e., by July 13, 1993. Furthermore, the improvements that exist on the leased premises--specifically the living quarters, the chicken and goat pens, the well house, and the various storage buildings--have not been constructed "in a good and workmanlike manner and in compliance with applicable laws and building codes."

E. The lessees have violated art. 15 of the lease in that they have not insured all building and permanent improvements on the premises against loss or damage by fire and the hazards usually included in extended coverage. This violation has persisted despite my June 8, 1992, request for proof of insurance.

F. [There had been a possible violation of Article 16 of the lease, relating to unlawful use of the property. (This possible basis for cancellation was not pursued.)]

(Superintendent's July 19, 1993, Letter at 6). The Superintendent informed the lessees that, pursuant to 25 CFR 162.14, they would be allowed ten days to show why their lease should not be cancelled, failing which he would proceed to cancel the lease.

After appellants filed a response to the Superintendent's letter, appellants and the Pueblo entered into settlement discussions. By June 1994, however, settlement discussions had broken down.

By letter of June 6, 1994, the Pueblo's attorney informed the Superintendent that, because there was no reasonable prospect of settlement, the Pueblo wished to reinstate its request that the lease be cancelled or declared void ab initio. In another document submitted in early June 1994, the Pueblo made further arguments concerning its request. An argument raised for the first time in that document was the argument that the Superintendent lacked the delegated authority in 1988 to approve a lease with a term as long as that of the lease at issue.

The Superintendent offered appellants an opportunity to respond to the new argument. After receiving appellant's response and a reply by the Pueblo, the Superintendent issued a decision, dated August 22, 1994, holding that (1) the lease had not been validly approved and was therefore void ab initio and (2) even if not void ab initio, the lease must be cancelled because appellants had violated some of its material terms.

Appellants appealed to the Area Director, who affirmed the Superintendent's decision on January 6, 1995. The Area Director stated:

After considering all of the information available, I find that because the lease was not validly approved on several different bases, it created no vested right in the lessees. First, under Albuquerque Area Office Redelegation Order 2, Amendment 2, published in the Federal Register on February 26, 1976, and in effect on July 13, 1988, when this lease was approved, the Acting

Superintendent, NPA, did not have delegated authority to approve any lease whose term exceeded twenty-five years inclusive of any provisions for extensions or renewals thereof. Because this lease not only set the initial term of twenty-five years, but also provided the lessees an option to renew for an additional twenty-five years, the Acting Superintendent did not have delegated authority to approve it.

Second, the applicable Federal environmental and archeological preservation laws cited in the briefings require that certain clearances be completed before BIA approval is given to tribal leases. BIA approval of a lease of tribal land which was not preceded by these studies is invalid. Here, no environmental assessment as required by the National Environmental Policy Act (NEPA) was carried out by NPA before approving this lease. Neither were the prerequisite cultural resources compliance procedures addressed before lease approval. It was only after Ms. Scott attempted to begin construction that the cultural resources compliance was sought and given. This lack of NEPA compliance also makes NPA's original lease approval invalid. Lacking valid approval, the lease vested no property interest in the lessees.

The lessees argue the offending "option" portion of the lease should be severed and the remainder of the lease should be deemed to be valid. Even if this were the case, the Superintendent was correct in concluding that the lessees have violated some of the lease's material terms and it was therefore proper to cancel the lease for cause. Specifically, the lessees have violated Article 19 of the lease in that they have not completed or caused to be completed the construction of a cabin or other residential buildings on the leased premises within the five year period after the effective date of the lease.

I also agree that based upon the evidence presented, the improvements that exist on the leased premises have not been constructed "in a good and workmanlike manner and in compliance with applicable laws and building codes." Finally, the lessees have violated Article 15 of the lease in that they have not insured all buildings and permanent improvements on the leased premises. Proper written notice of these breaches was provided by NPA's July 19, 1993, letter to the lessees and they were asked to show cause why the lease should not be canceled. They were then given a reasonable time to respond and cure these breaches which was not done. [Footnotes omitted.]

(Area Director's Jan. 6, 1995, Decision at 2-3).

Appellant appealed the Area Director's decision to the Board. Briefs were filed by appellant, the Area Director, and the Pueblo.

Discussion and Conclusions

All parties agree that, at the time appellants' lease was approved in 1988, the effective delegation of authority from the Area Director to the Superintendent was the delegation published in the Federal Register on February 26, 1976, 41 FR 8401. That delegation, titled "Albuquerque Area Office Redelegation, Order 2, Amdt. 2, Delegation of Authority Relating to Lands and Minerals," provides:

Sec. 2.14. Surface Leases. To the Superintendents of Jicarilla, Northern Pueblos, Southern Pueblos, Southern Ute, and Ute Mountain Ute Agencies only, the authority of the Area Director relating to surface leasing and permitting under 25 CFR Part 131 [now Part 162]. With the exception of homesite leases covering tribal land leased to tribal members or to tribal housing authorities for homesite purposes this authority does not apply to:

(1) Approval of leases or permits which provide for a duration in excess of twenty-five (25) years inclusive of any provision for extensions or renewals thereof.

In view of this provision, appellants concede that the Superintendent lacked the authority to approve the term of appellant's lease as written. They contend, however, that the Superintendent's lack of authority in this regard did not make the lease void ab initio, as the Area Director held. Rather, they contend, the option to renew the lease may be severed, rendering the remainder of the lease valid, as within the Superintendent's authority to approve.

Appellants argue that the renewal provision may be severed because it is not essential to the lease. They cite a number of authorities, albeit none dealing with leases of Indian land, for the proposition that an invalid provision may, in appropriate circumstances, be severed from a contract and the remainder of the contract enforced, if the provision to be severed is not essential to the contract.

Both the Area Director and the Pueblo dispute the contention that the renewal provision of this lease is severable. They contend that, as a matter of law, the severability doctrine does not apply to leases of Indian land and that, even if it were applicable to Indian leases, the doctrine would not allow severance of the renewal provision in appellants' lease.

[1] In Smith v. McCullough, 270 U.S. 456 (1926), the Supreme Court addressed the question whether, in a case where a Federal statute limited the term of certain Indian mining leases to 10 years, a lease for a longer term could be made valid by severing the portion of the lease term beyond that authorized by the statute. The Court rejected that notion, stating in part:

The permission to give short leases was in the nature of an exception to the comprehensive restraint already imposed [upon

the alienation of certain Indian land] and hardly could have been intended to give any effect or recognition to leases negotiated and made in disregard of that limited permission. A lease not within that permission evidently was intended to be left where it was before--within the general prohibition and invalid. Otherwise the allottees would be exposed to much of the evil intended to be excluded; for of course many intending lessees would be disposed to obtain leases for long terms if no other risk was run than that of having their rights held down to the maximum admissible term, if the allottee or the United States should discover the situation and take proceedings to correct it.

270 U.S. at 465. In United States v. Southern Pacific Transportation Co., 543 F.2d 676 (9th Cir. 1976), the Court of Appeals for the Ninth Circuit cited Smith v. McCullough as one of two Supreme Court decisions it deemed controlling on the issue before it--i.e., whether an Indian tribe's invalid attempt to convey an easement impliedly conveyed a revocable license. In describing the holding in Smith v. McCullough, the court of appeals stated: "Without disputing that the invalid terms might be severable as a matter of common law contract interpretation, the Supreme Court [held] that the severability doctrine could not be applied to give effect to part of an invalid Indian lease." 543 F.2d at 698-999.

Even if there were no Federal case law on point, the Board would exercise caution in applying rules developed in a non-Indian context to leases of Indian land. See, e.g., Benson-Montin-Greer Drilling Corp. v. Acting Albuquerque Area Director, 21 IBIA 88, 96, 98 I.D. 419, 424 (1991), aff'd Benson-Montin-Greer Drilling Corp. v. Lujan, No. CIV-92-210 SC-LFG (D.N.M. Jan. 13, 1993). Here, however, there is no need for elaborate analysis, because the Supreme Court has already held that an Indian lease with an invalid term cannot be made valid by severing the invalid portion of the term.

It is perhaps arguable, although appellants do not so argue, that the instant case may be distinguished from those addressed by the Federal courts because, here, the lease provision was held to be invalid, not under a Federal statute, but only under an administrative delegation of authority.

25 U.S.C. § 415, under authority of which this lease was approved, provides that "all leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior." The Departmental delegations of authority to approve leases under 25 U.S.C. § 415 are among the "terms and regulations" prescribed by the Secretary under this statutory authority and are thus a part of the body of law governing this lease. In general, the same rules of construction apply to regulations concerning Indian trust resources as apply to statutes concerning those resources. E.g., Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324, 1331-32 (10th Cir. 1982) (BIA regulations governing Indian mineral resources are subject to the rule of statutory construction that enactments intended to benefit Indians must be liberally construed in their favor).

In implementing its trust responsibility for Indian resources, leases of which are subject to approval under 25 U.S.C. § 415, BIA may place limitations on the approval authority it vests in various officials. Where such limitations are imposed, it is undoubtedly with the same intended result as that described in Smith v. McCullough, i.e., that a lease not within the permission granted will "be left where it was before--within the general prohibition and invalid."

The Board finds that the rule of Smith v. McCullough applies to leases which are invalid under BIA regulations and/or delegations of authority.

This case also differs from Smith v. McCullough and Southern Pacific Transportation Co. in that, here, a Federal official, i.e., the Superintendent, purported to approve the lease. As the parties agree, however, the Superintendent acted outside the scope of his authority. The Board has stated on a number of occasions that the unauthorized acts of BIA employees cannot serve as the basis for conferring rights not authorized by law. E.g., D. G. & D. Logging Co. v. Billings Area Director, 20 IBIA 229, 235 (1991). See also Sangre de Cristo Development Co. v. United States, 932 F.2d 891, 894-95 (10th Cir. 1991), cert. denied, 112 S. Ct. 1760 (1992); Gray v. Johnson, 395 F.2d 533, 537 (10th Cir.), cert. denied, 392 U.S. 906 (1968) (Where a BIA official approves a lease that is contrary to regulations and not in the best interest of the Indian lessors, the lessee does not acquire a vested interest); Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947) (The Government is not bound by the unauthorized acts of its employees). Thus, the Superintendent's ultra vires act did not vest appellants with any right to invoke the severability doctrine where such a right does not otherwise exist under the body of law governing Indian leases.

The Board finds that, under the law applicable to this case, the renewal option in appellants' lease is not severable.

Even if the Board were to accept appellants' argument that the severability doctrine applies to their lease, the Board could not accept their contention that the option provision is "non-essential" and therefore severable under that doctrine. For one thing, it is generally accepted that the term of a lease is one of its essential elements. 49 Am. Jur. 2d Landlord and Tenant § 23 (1995); 51C C.J.S. Landlord and Tenant § 215 (1968). Further, although appellants now state that the renewal option was not important to them when they negotiated the lease, both the lease itself and contentions appellants made earlier in these proceedings suggest otherwise. 3/ In any event, the Board recognizes the language of the lease

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3/ Arguing against the applicability of the term limitation for agricultural leases in 25 CFR 162.8(c), appellants contended that "the lease term should conform to the purpose which requires the greatest term" and that "[t]o do otherwise, would unreasonably restrict that purpose and would deny the lessees the full benefit of that bargained-for purpose." Thus, appellants continued, "a twenty-five year term with an option to renew on a residential lease which includes agricultural activities, is proper" (Appellants' Aug. 12, 1993, Response to Notice of Proposed Action at 17).

itself as the most reliable evidence of the parties' intent. See, e.g., Pinoleville Indian Community v. Acting Sacramento Area Director, 26 IBIA 292 (1994). In this case, not only was the term, including the renewal option, clearly set out in Article 3 of the lease but an explicit limitation on rental adjustments during the renewal period was specified in Article 5. The Board finds these provisions persuasive evidence that the parties intended the lease term, including the renewal option, to be an essential provision of the lease.

The Board finds that the renewal option would not be severable from the lease even if the severability doctrine were applicable here.

[2] In essence, appellants are seeking a modification of their lease through excision of the renewal option. The Board has held that, where the Indian lessors object to the modification of a lease, neither this Board nor BIA has the authority to modify it. See Racquet Club Properties, Inc. v. Acting Sacramento Area Director, 25 IBIA 251 (1994). In light of the Pueblo's objections in this case, the Department is without authority to modify appellants' lease.

[3] The Board finds that appellant's lease is invalid because it was not approved by a BIA official with authority to approve it. The Board therefore affirms the Area Director's decision in this regard.

The Area Director also found the Superintendent's 1988 lease approval invalid because of failure to comply with NEPA. Recognizing that the Federal courts have held leases invalid for lack of NEPA compliance, e.g., Sangre de Cristo Development Co., supra; Davis v. Morton, 469 F.2d 593 (10th Cir. 1972), appellants contend that their lease can be distinguished from the lease at issue in those cases in that (1) appellants' lease is a small lease for traditional uses of the property and (2) an environmental assessment (EA) was done for an earlier lease of the property which authorized the same uses. Further, appellants contend, archeological clearance has now been granted, so the question of NHPA compliance is now moot.

Appellants' arguments are based in part on a provision in BIA's 1988 revision of its NEPA procedures, i.e., a categorical exclusion from NEPA requirements for the "renewal of agricultural or other leases when environmental impacts are addressed in an earlier environmental document." 516 DM (Departmental Manual) 6, Appendix 4, sec. 4.4D (effective Mar. 24, 1988).

The categorical exclusion in sec. 4.4D does not, by its terms, apply to the issuance of a lease to a new lessee, even if the new lease calls for the same uses as an earlier lease. More importantly, although a portion of the land included in appellants' lease was included in a 1972 lease, for which an EA was prepared, appellant's lease covers more land and has a considerably broader purpose than did the 1972 lease. The 1972 lease covered 4.64 acres, whereas appellants' lease covers 12.69 acres. The purpose of the 1972 lease, as stated in Article 4 of the lease, was "to build a cabin or small home for recreational or full time residential

use by the Lessees." As indicated above, Article 4 of appellants' lease authorized them, in addition to constructing a home, to control erosion, "clear land, plant trees, fruits, raise livestock and construct and maintain a water system for Lessees use," as well as "to use 'mesas' on the North boundary of property for the construction of water well facilities and/or other residential buildings." Under these circumstances, it is clear that the NEPA requirements for appellants' lease cannot be deemed satisfied by the EA done for the earlier lease.

[4] The Board finds that, under Sangre de Cristo Development Co. and Davis, the Superintendent's approval of appellants' lease was invalid for failure to comply with NEPA.

As noted above, the Area Director also found that appellants' lease, even if not void ab initio, was subject to cancellation because of certain violations of the lease. The Board finds it unnecessary to reach these questions because it affirms the Area Director's holding that the lease was void ab initio. 4/

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Area Director's January 6, 1995, decision is affirmed.

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//original signed

Anita Vogt  
Administrative Judge

I concur:

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//original signed

Kathryn A. Lynn  
Chief Administrative Judge

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4/ The Board also finds it unnecessary to address the other grounds raised by the Pueblo for finding the lease void ab initio or for cancelling the lease.

All arguments made by appellants and not addressed in this decision have, to the extent they are relevant to the issues discussed herein and raise issues within the jurisdiction of this Board, been considered and rejected.